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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1085

SAMUEL SALVADORE PERNICIARO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition of Samuel Salvadore Perniciaro for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and brief in support thereof.

HUGH M. WILKINSON,
JOHN D. LAMBERT,
HUGH M. WILKINSON, JR.,
Attorneys for Petitioner.

HAUSER PRINTING CO., INC., NEW ORLEANS

IN THE

Supreme Court of the United States

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SAMUEL SALVADORE PERNICIARO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition of Samuel Salvadore Perniciaro for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and brief in support thereof.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, SAMUEL SALVADORE PERNICIARO, a citizen of the United States, domiciled in the State of Louisiana, respectfully brings this, his application for a *writ of certiorari*, to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW

Petitioner was convicted on April 3, 1946, in the District Court for the Eastern District of Louisiana

of violating the Selective Service Act. C. 720, par. 11, 54 Stat. 894; Title 50, App. U.S.C.A. Section 311. He was found guilty on the last count of an eight count indictment. Sentence was imposed on April 5, 1946, petitioner being condemned to serve four (4) years in a United States penitentiary.

Petitioner thereupon took his appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where judgment was rendered affirming his conviction on December 30, 1946. Petitioner, within the delays allowed by law, filed his petition for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit, which petition for rehearing was denied on February 3, 1947 with no written opinion rendered. On February 6, 1947, a stay of mandate was ordered by the said United States Circuit Court of Appeals for the Fifth Circuit, for a period of thirty (30) days, exclusive of Sundays and holidays, from February 3rd, 1947, to enable petitioner to apply to this Honorable Court for a *writ of certiorari* to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

STATUTE INVOLVED

The statute under which defendant was convicted is Section 11 of the Selective Training and Service Act, reading as follows:

> **"Offenses and punishment.** Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, any person charged

with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or

> unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act." Sept. 16, 1940, c. 720, par. 11, 54 Stat. 894; Title 50, App. U.S.C.A. par 311.

The regulation of the National Director of Selective Service which created the alleged duty on the part of defendant, for the failure of which to perform he must spend the next four years in a federal penitentiary, reads as follows:

> "Section 626.1.
>
> "(b) Each classified registrant shall, within ten days after it occurs, and any other person should, within ten days after knowledge thereof, refer to the local Board in writing any fact that might result in such registrant being placed in a different classification."

Paragraph (b) of Section 621.1 was amended by Amendment No. 325 (10 FR 9210) effective July 23, 1945, but the above regulation was in effect at the time of the alleged crime. Further, the amendment made no change affecting the issue we present here.

JURISDICTION

Jurisdiction of this Honorable Court is invoked under paragraph (a) Section 240 of the Judicial Code as amended (Section 347, Title 28 U.S.C.A.), making it competent for this Court to review by *certiorari* any case, civil or criminal, in a circuit court of appeals; and the application is made within 30 days after entry of judgment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7,

1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED

Your petitioner, Samuel Salvadore Perniciaro, was indicted jointly with Frank Walter Mogall by an indictment dated July 26, 1945 and returned by a grand jury empaneled and duly qualified in the Eastern District of Louisiana.

There were eight counts to the indictment. Both defendants were found not guilty on the first seven counts but were found guilty in the eighth.

The first count charged a conspiracy on the part of the two defendants to prevent Perniciaro's being drafted into the armed forces through the medium of keeping him classified as an essential worker in the shipbuilding industry. Mogall was the Superintendent of the pipe factory of the Delta Shipbuilding Co., and the recital was that pursuant to the alleged conspiracy he sent, or caused to be sent, certain communications to Local Board Number 8, and otherwise protected Perniciaro's status within the plant from certain foremen who reported Perniciaro for failure to work. Both were acquitted on this count.

Count two charged the substantive crime that both had violated the criminal provisions of the Selective Service Act and regulations thereunder in that they had, on February 22, 1943, written or caused to be written certain false statements to the Selective Service Local Board Number 8 concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count three charged that both defendants had caused to be presented to Local Board Number 8 in the same document further false statements. Both defendants were acquitted under this count.

Count four charged the causing to be rendered to the same Local Board Number 8 further false statements in a certificate dated May 6, 1943 and concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count five charged the causing to be rendered to Local Board Number 8 further false statements in a certificate dated October 28, 1943, and concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count six charged the defendants with causing to be made to Local Board Number 8 a false certificate dated April 11, 1944, and concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count seven charged the defendants with causing to be made to Local Board Number 8 a false certificate dated October 16, 1944, and concerning the occupational status of Perniciaro. Both defendants were acquitted under this count.

Count eight charged that each defendant committed a crime under the Selective Training and Service Act in that each did not report certain facts to Local Board Number 8 which would have resulted in Perniciaro being placed in a different classification. They were both convicted under this count.

The facts essential to an approach to the legal issues of this petition are these:

Samuel Salvadore Perniciaro was an employee of the Delta Shipbuilding Company, Inc., being (from the official records) employed the entire time as a pipe fitter and employee of the pipe department. Frank Walter Mogall was the superintendent of said plant. The government admitted that Perniciaro came through the gate every morning and stayed there throughout the day. He was officially employed and physically present during the entire time embraced by **all counts** of the indictment. The government's case rests on the allegations that Perniciaro "actually did not work but loafed and slept on the job."

The conviction was not for conspiracy. That was count one under which there was an acquittal. Likewise both defendants were acquitted of uttering or causing to be uttered false statements to the Local Board Number 8.

QUESTION PRESENTED

The specific crime under which the defendants were convicted was that each, in his own individual capacity, had a duty to report a change in Perniciaro's status and having failed to so do accomplished, each one, his individual crime.

This petition raises the specific issue of whether the statute and regulation actually create and adequately define the crime with which Samuel Salvadore Perniciaro was charged and stands convicted; and secondly, whether the constitution of the United States allows such a state of facts to constitute the crime purportedly created and

defined, providing the statute and regulations do say what the District Court and the Circuit Court have interpreted them to say.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reasons relied on for the allowance of a *writ of certiorari* are:

1. Count eight of the indictment, in charging that Perniciaro did not report to Local Board Number 8 the fact that he was "loafing" and "sleeping on the job", charged no crime known to the laws of the United States, and his conviction thereunder deprived him of due process of law contrary to the Constitution of the United States; and

2. That if Section 11 of the Selective Training and Service Act, supplemented by Section 626.1 (b) of the Regulations of the National Director of Selective Service, does purport to create a crime the essentials of which are a failure by a deferred civilian worker to report to the Local Board the fact that while officially employed and physically present in an essential industry he was not working to the utmost of his capacity or was outrightly loafing, then the Section and the regulation are null and void and unconstitutional and should be so declared by this Honorable Court for failure to create a definite and certain standard.

The Act of the Congress says nothing of a duty to report a change in status. It is the regulation of the Director of Selective Service which creates such a duty. So our issue is, first, does the regulation actually create a duty of a worker to report his own loafing; and, secondly, does not such a law violate the Constitution as having too vague, uncertain and indefinite a standard.

TRANSCRIPT ANNEXED

The record having been printed for the use of the Court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, your petitioner has filed herewith the copies of said record as printed below, together with the proceedings and opinion in this Honorable Circuit Court of Appeals for the Fifth Circuit, and due certification thereon of the Clerk of said Court.

SUPPORTING BRIEF

Petitioner also files herewith and makes part of this application his brief in support thereof.

PRAYER

WHEREFORE, petitioner Samuel Salvadore Perniciaro respectfully prays that a *writ of certiorari* may issue to the Honorable the United States Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioner, setting aside his conviction and sentence pronounced below, and discharging him forthwith; and petitioner prays for all further and necessary orders proper in the premises; and for all such relief as the nature of the case may justify.

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JOHN D. LAMBERT,
HUGH M. WILKINSON, JR.,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

We will deal with only one issue and endeavor to be as concise as possible, in accordance with paragraph 2 of Rule 38 of this Court.

The question we present is that count eight of the indictment was and is invalid on its face, in so far as it includes the defendant Samuel Salvadore Perniciaro, in that it charges no crime known to the laws of the United States; and that if the acts charged are claimed to be a crime under any law of the United States, then such law is invalid and should be so declared by this Court as furnishing too vague, too indefinite and too uncertain a standard of guilt.

THE STATUTE

Section 11 of the Selective Training and Service Act (Section 311, Title 50 App. U.S.C.A.) describes no crime consisting of a failure of a deferred worker to report inattention to duty or any degree of laziness on a job. Nowhere in the Act is such a crime described. Section 5 (k) of the Act (Section 305 (k), Title 50, App. U.S.C.A.) merely says that should a deferred employee leave the occupation under which he is deferred, then the local board shall reclassify him as available for military duty. Section 11 is a general penalty section covering any failure to comply with the specific duties created under the Act.

Therefore, Congress did not create a crime consisting of the elements of a deferred worker not report-

ing to the local board the fact that while reporting daily to the job under which he was deferred he was loafing on the job. And it is understandable why such a provision was not included, for the normal process would be for the representative of the employer to fire such a worker.

The first count charged a conspiracy between the co-defendants, but they were acquitted of any conspiracy.

THE REGULATION

The question then follows as to whether the Regulations of the National Director of Selective Service purport to create, where the statute does not, a crime consisting of a deferred worker not reporting to his local board the fact that, while reporting to work each morning and remaining on the premises all day, he was loafing on the job.

The only regulation approaching this question presently reads as follows:

> **"Section 626.1**
>
> (a) No classification is permanent.
>
> (b) Each classified registrant and each person who has filed his request for the registrant's deferment shall, within ten days after it occurs **refer to the local Board in writing any fact that might result in the registrant being placed in a different classification.** Any other person should, within ten days after knowledge thereof, refer to the local Board in writing any such fact.
>
> (c) The local Board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined. Members may be requested

to furnish information; police officials or other agencies may be requested to make investigations, and other steps may be taken by the Board to keep currently informed concerning the status of classified registrants." (Emphasis ours)

During the entire time covered by the facts charged in the indictment Section 626.1 (b) read as follows:

"Section 626.1

(b) **Each classified registrant shall, within ten days after it occurs,** and any other person should, within ten days after knowledge thereof, **refer to the local Board in writing any fact that might result in such registrant being placed in a different classification.**" (Emphasis ours)

Paragraph (b) of Section 621.1 was amended as above by amendment No. 325 (10 FR 9210), effective July 23, 1945.

Now, under the Act as passed by Congress, the fact that Perniciaro was guilty of even a greater or possibly a lesser degree of loafing on an essential job would not have been in itself a "fact that might result in such registrant being placed in a different classification." Section 5 (k) of the Statute says that should a "person **leave** such occupation or endeavor * * * his selective service local board * * * shall reclassify such registrant in a class immediately available for military service. * * * "

The conclusion is sound that neither the statute nor the regulation placed a duty on a deferred worker to report to his local board the fact that he was loafing to any degree or even completely loafing. The Statute and the regulation leave that duty where it belongs—

on the employer—and the obvious course was for the employer to fire such an employee which act of dismissal would put said employee under an instantaneous duty to report such fact to the local board.

THE STATUTE OR REGULATION UNCONSTITUTIONAL IF CONSTRUED TO CREATE THIS CRIME

This regulation 626.1 was before the Circuit Court of Appeals for the Fifth Circuit on a prior occasion wherein it was argued that the duty of reporting a change in status was too vague, uncertain and indefinite a standard and that the regulation was therefore unconstitutional under the Sixth Amendment to the Constitution of the United States. *Stassi v. United States*, 152 F. (2) 581 (1945). That was the case of a man who **did not report for work at all** and the Circuit Court held that such was a "fact that might result in such registrant being placed in a different classification."

The result in the *Stassi* case can logically be said to be within the scope of Section 5 (k) of the statute, for to remain away from the premises of the employment in which deferred, that is, actual absenteeism, would constitute a deferred worker **leaving** "the occupation under which he is deferred."

But Perniciaro reported for work every day. Accepting count eight of the indictment on its face and admitting, for purposes of attacking that count on its face, that all facts are true, Perniciaro was there all day each working day but, in the language of count eight of this indictment pretended to work, "did not actually perform any useful work in support of the

war effort, but merely checked in and out, and during the hours which the records of the Delta Shipbuilding Company, Inc. show that he ostensibly worked, he actually did not work but loafed and slept on the job and disappeared during working hours practically all of the time during the hours for which he was paid by said Delta Shipbuilding Company, Inc., for apparent work at the plant from June 15, 1942 to January 31, 1945."

Perniciaro did not leave his deferred occupation. At the worst, according to the crime charged, he loafed. There was then and is now no crime in failing to report to the local board your own personal loafing, whatever be its degree, under the laws of the United States.

VAGUE, INDEFINITE AND UNCERTAIN

If it be decided that Regulation 626.1 purports to encompass the situation of the loafing and put on a deferred worker the burden of reporting his own loafing to his local board, then the regulation is unconstitutional as being vague, indefinite and uncertain. For the degree of loafing is indefinite and uncertain. A man is lazy and neglects 5% of his work. Another neglects 10%. And so on down the line until you have a man reporting for work and doing nothing but standing around all day long. Under the charges of count eight Perniciaro is somewhere along this line. At what percentage of loafing did it become a crime for him not to report his loafing to the local board? There is no certain standard to the regulation if it be so applied and it would violate the constitutional rights of this defendant Perniciaro.

If the regulation purports to cover the situation

charged in count eight, this Honorable Court should declare it invalid and unconstitutional and discharge the defendant Perniciaro. If it does not purport to cover the situation, the defendant Perniciaro should be ordered discharged and released as having been convicted and sentenced for a crime which does not exist under the laws of the United States.

Respectfully submitted,

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Attorneys for Petitioner.

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Nos. 1085 [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1946

SAMUEL SALVADORES PERTICIARO, PETITIONER

v.

UNITED STATES OF AMERICA

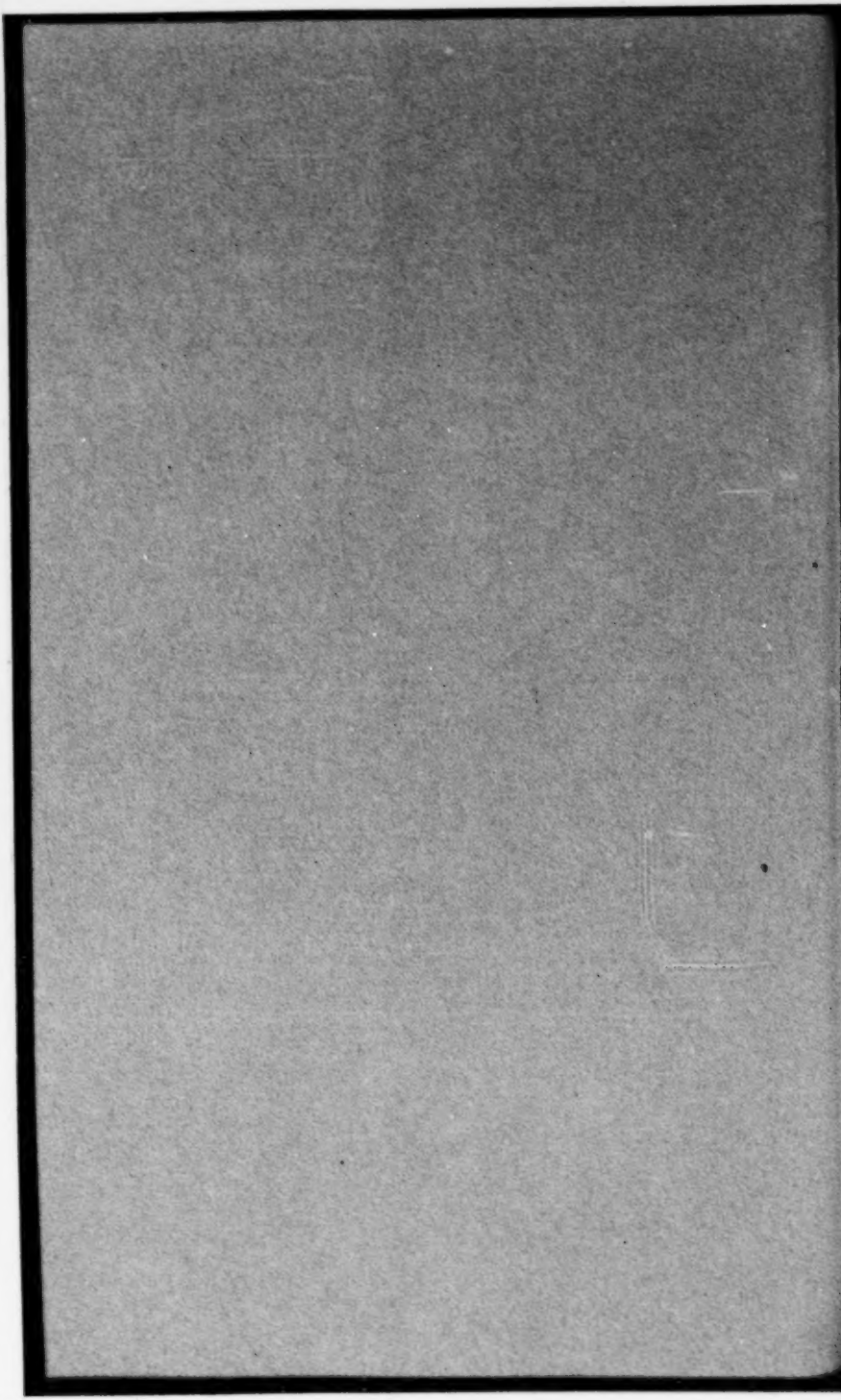
FRANK WALTER MOGALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1085

SAMUEL SALVADORE PERNICIARO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1092

FRANK WALTER MOGALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 81–82) is reported at 158 F. 2d 792.

JURISDICTION

The judgment of the circuit court of appeals was entered December 30, 1946 (R. 83), and a

joint petition for rehearing (R. 84–90) was denied February 3, 1947 (R. 91). The petitions for writs of certiorari were both filed March 3, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioners' convictions on count 8 should be reversed on the ground of inconsistency in the verdict.

2. Whether, as applied to petitioners, Section 626.1 (b) of the Selective Service Regulations, which requires that the local board be informed of any facts which "might result in the registrant being placed in a different classification", is too vague and indefinite to support a criminal prosecution and conviction for knowingly failing to comply with it.

STATUTE AND REGULATIONS INVOLVED

Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 311), provides in part:

> Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the dis-

> trict court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *

The applicable Selective Service Regulations provided as follows during the greater part of the period involved in this case:

> 622.22 Class II–B: *Necessary man in war production.* (a) In Class II–B shall be placed any registrant who is found to be a "necessary man" in war production. (8 F. R. 11346.)
>
> (b) Class II–B deferments shall be for a period of 6 months or less. If there is a change in the registrant's status during the period of deferment in Class II–B, his classification shall be reopened and considered anew. At the expiration of the period of the registrant's deferment in Class II–B, his classification shall be reopened, and he shall be classified anew. In again classifying the registrant, care should be taken not to impede the war production program. The registrant should be again classified in Class II–B for a period of 6 months or less if such classification is warranted and if the registrant's employer has made a reasonable but unsuccessful effort to secure or train a replacement for the registrant during the period of deferment. The same rule shall be applied when again classifying such a registrant at the end of each successive period for which he had

been classified in Class II–B. (6 F. R. 6607.[1]

* * * * *

622.24. *"Necessary man" defined.* A registrant shall be considered a "necessary man" in war production or in support of the war effort, including training and preparation therefor, only when all of these conditions exist: (1) He is, or but for a seasonal or temporary interruption would be, engaged in war production or in support of the war effort; (2) his removal would cause a serious loss of effectiveness therein; and (3) he cannot be replaced. (8 F. R. 11346.)[2]

* * * * *

626.1. *Classification not Permanent.* (a) No classification is permanent. * * *

---

[1] Subsection (b) was amended on April 20, 1944 (9 F. R. 4385), to read as follows:

"(b) In Class II–B shall be placed any registrant who by reason of his occupation is found to be 'making a contribution' to war production and who is:

"(1) Age 38 or over, or

"(2) Age 18 through 37, and

"(i) Who is found to be qualified for limited military service only, or

"(ii) Who is found to be disqualified for any military service. (This shall be deemed to include every registrant who would be placed in Class I–C, Class IV–C, or in Class IV–F if it were not for the fact that he qualifies for classification in Class II–B under the provisions of this section.)"

[2] On April 20, 1944, this Section was amended (9 F. R. 4385), as follows:

"622.24 *'Necessary man' defined.* A registrant shall be considered a 'necessary man' only when all of these condi-

> (b) Each classified registrant shall, within 10 days after it occurs, * * * report to the local board in writing any fact that might result in the registrant being placed in a different classification. (6 F. R. 6843.)

STATEMENT

On July 26, 1945, an eight-count indictment was filed in the District Court for the Eastern District of Louisiana, charging (counts 2–8) that petitioners violated Section 11 of the Selective Training and Service Act and regulations promulgated thereunder, in connection with the registration of petitioner Perniciaro, and (count 1) that they conspired to do so (R. 3–28). After a jury trial, both petitioners were acquitted on counts 1 through 7, but found guilty on count 8 (R. 32, 57). Thereafter the trial court sentenced Perniciaro to imprisonment for four years (R. 68–69) and Mogall to imprisonment for two years and to pay a fine of $500 (R. 69–70). On appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed (R. 83).

Petitioners have not caused the evidence which was adduced at their trial to be incorporated in

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tions exist: (1) He is, or but for a seasonal or temporary interruption would be, engaged in war production or in support of the war effort; (2) his removal would cause a serious loss of effectiveness therein; (3) he cannot be replaced; and (4) he meets such other conditions and qualifications as may be prescribed from time to time by the Director of Selective Service."

the record on appeal. Accordingly, the following facts asserted in count 8 of the indictment (R. 25–28) must be taken as true:

Perniciaro was employed at the Delta Shipbuilding Company, New Orleans, Louisiana, from June 15, 1942, to January 31, 1945. Mogall was the superintendent of the pipe department to which Perniciaro was assigned. The records of the company ostensibly showed that Perniciaro worked regularly at the company's yard an average of 48 hours per week, whereas in fact he merely pretended to work, by checking in and out at the yard as the company's time cards showed, and loafed or slept on the job and disappeared during his ostensible working hours. Petitioners knowingly failed to report to Local Board No. 8, New Orleans, with which Perniciaro was registered, the foregoing facts or the fact that Perniciaro was not, as ostensibly shown by the company records, actually performing any useful work in support of the war effort during the period in question.

ARGUMENT

1. Petitioner Mogall contends that the verdict on count 8 is so wholly inconsistent with and repugnant to the acquittal on counts 1 through 7 of the indictment, that his conviction on count 8 is void (Pet. 5–12). But the law is that "Each count in an indictment is regarded as if it was a separate indictment." *Dunn* v. *United States*, 284 U. S. 390, 393. See also, *e. g.*, *Crespo* v.

United States, 151 F. 2d 44, 45 (C. C. A. 1), certiorari dismissed, 327 U. S. 758; *United States* v. *Albers,* 115 F. 2d 833, 836 (C. C. A. 2); *Williams* v. *United States,* 151 F. 2d 736, 737 (C. C. A. 4); *Murphy* v. *United States,* 133 F. 2d 622, 627 (C. C. A. 6); *Downing* v. *United States,* 157 F. 2d 738 (C. C. A. 8). Consequently, as those cases indicate, the verdict on count 8 need not have been consistent with that on the other counts of the indictment.

However, even if inconsistency in a verdict were a basis for challenging a conviction, the asserted inconsistency here cannot be assumed in the absence of the evidence at the trial (see opinion below at R. 82). Cf. *United States* v. *Dunbar,* 149 F. 2d 151 (C. C. A. 7), certiorari denied, 325 U. S. 889; *Miller* v. *United States,* 125 F. 2d 517, 519 (C. C. A. 6), certiorari denied, 316 U. S. 687; *United States* v. *Twentieth Century Bus Operators,* 101 F. 2d 700, 702 (C. C. A. 2), certiorari denied, 307 U. S. 624. A complete record might show that the jury's action on the different counts can be reconciled. For example, the acquittal on count 1 might have resulted from a failure of proof of the required conspiratorial elements. Similarly, the proof on counts 2 through 7 may not have satisfied the jury that Perniciaro knew anything about the letters which Mogall was charged with having sent the draft board, or that Mogall wrote or mailed the letters. It does not necessarily follow that there

was insufficient proof of petitioners' knowledge of the facts asserted in count 8 or of their wilful omission to perform the affirmative act of notifying Perniciaro's draft board of these facts.

2. Petitioner Perniciaro contends that Section 626.1 (b) of the Selective Service Regulations (*supra*, p. 5), upon which count 8 of the indictment is predicated,[3] creates so vague, indefinite, and uncertain a standard of responsibility that it cannot constitutionally support his conviction for failing to inform the local draft board of the facts asserted in that count (Pet. 7–8, 11–16).

It is questionable whether this contention can now be advanced since petitioners did not assert it in the trial court or seasonably in the court below.[4] Cf. *Yakus* v. *United States*, 321 U. S. 414, 444–448. In any event, there is no merit in this contention. Precisely the same question was raised in the case of *Stassi* v. *United States*, 152 F. 2d 581, certiorari denied, 328 U. S. 842, in

[3] Section 11 of the Selective Training and Service Act, set forth *supra*, pp. 2–3, makes it an offense, *inter alia*, knowingly to fail to perform a duty required by the Selective Service Regulations.

[4] The record does not show that petitioners demurred to the indictment or requested instructions to the jury presenting the question now sought to be raised. They moved for a new trial (R. 59–66) and in arrest of judgment (R. 66–67), but both motions were confined to the asserted inconsistency of the verdicts. The Grounds of Appeal (R. 77) and Assignments of Errors (R. 77–78), as well as the original submission below (R. 82), were similarly limited, and the question now urged was first presented in the petition for rehearing below (R. 84, 87–89).

which the Fifth Circuit held that the selective service regulation was not, as claimed, too vague, indefinite, and uncertain to support the conviction there. As we pointed out in our brief in opposition in that case (No. 971, Oct. T. 1945), Section 626.1 (b), rather than enumerating every fact of which a registrant is required to inform his local board, which would not be feasible because it would require extensive detail, is expressed in terms which must be applied to specific factual situations. And, while conceivably there may be hypothetical cases where the regulation might be so vague in its application as to preclude criminal prosecution, that possibility should not affect those situations where there is no occasion for speculation. In the instant case, there can be no doubt that if the draft board had been notified that Perniciaro, while ostensibly working full time in the ship yard, was actually merely checking in and out and loafing on the job or pursuing his own devices, it would have taken away from him his then existing "necessary man" classification (see Selective Service Regulations 622.22 and 622.24, *supra,* pp. 3–4). Consequently, as in the comparable circumstances of the *Stassi* case, we submit that the applicability of Selective Service Regulation 626.1 (b) to petitioners was not speculative, and that therefore the contention that it is too vague and uncertain to support their convictions is without merit.

CONCLUSION

The judgment below is clearly correct, and there is no conflict. We therefore respectfully submit that the petitions should be denied.

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MARCH 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1085

SAMUEL SALVADORE PERNICIARO,
Petitioner,

versus

UNITED STATES OF AMERICA.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a rehearing be granted for the petition for a *writ of certiorari* to review the judgment of the Circuit Court of Appeals for the Fifth Circuit filed herein and denied on the 14th day of April, 1947.

QUESTIONS PRESENTED BY FORMER PETITION

The original petition for a *writ of certiorari* presented the following questions:

1. Count eight of the indictment, in charging that Perniciaro did not report to Local Board Number 8 the fact that he was "loafing" and "sleeping on the job", charged no crime known to the laws of the United States, and his conviction thereunder deprived him of due process of law contrary to the Constitution of the United States; and

2. That if Section 11 of the Selective Training and Service Act, supplemented by Section 626.1 (b) of the Regulations of the National Director of Selective Service, does purport to create a crime the essentials of which are a failure by a deferred civilian worker to report to the Local Board the fact that while officially employed and physically present in an essential industry he was not working to the utmost of his capacity or was outrightly loafing, then the Section and the regulation are null and void and unconstitutional and should be so declared by this Honorable Court for failure to create a definite and certain standard.

Regarding the above conclusions we do not intend to reargue what we have previously set out in the original petition for *certiorari*. Our position was that on its face Regulation 626.1 should not be construed to say a deferred worker had the duty to report to his local board his degree of application to the job for which he was deferred. If the regulation was so interpreted, then we argued, the regulation was invalid and unconstitutional as employing too vague a standard. For at what degree of inattention to work and at what degree of sheer loafing does one assume the role of a criminal for failure to report such to the local board?

We re-urge these grounds here.

The only answer to these issues made by the Acting

Solicitor General in his brief was to say that this matter of vagueness in the regulation has been determined in *Stassi v. United States*, 152 F. (2d) 581, *certiorari* denied, 328 U.S. 842. In the *Stassi* case the worker actually ceased presenting himself for work and to all intents and purposes quit the job for which deferred. The court held it was not a vague duty to say that he should report such to the local board. We agree.

But Perniciaro did not quit. He spent every working day in the shipyard. But the indictment charges that he loafed on the job. Our argument is that it is a vague and uncertain standard to legislate that Perniciaro committed a crime when his loafing reached an unknown and uncertain degree without reporting same to the local board.

FRANK WALTER MOGALL V. U.S.

Mogall and Perniciaro were joint defendants. Both sought *writs of certiorari* to the Circuit Court of Appeals for the Fifth Circuit. Mogall was granted a writ on April 14th, 1947 and Perniciaro's petition was denied.

Mogall's reason relied on for the issuance of a *writ of certiorari* was as follows:

> "(1) That the verdict of Guilty on count eight of the Indictment, is unreasonable, is wholly inconsistent with and is repugnant, to the Jury's finding in defendant's favor of 'Not Guilty' on the first seven counts of the Indictment, thereby rendering the verdict of Guilty on count eight of the Indictment void."

This was the only reason advanced in the interest of Mogall. It is the same reason on which both defend-

ants sought and were denied a rehearing by the Circuit Court.

We now petition this Court to grant Samuel Salvadore Perniciaro a *writ of certiorari* on this above stated ground, noting that Mogall and Perniciaro were joint defendants on each count of the original indictment and any inconsistency in the verdicts rendered which deprived Mogall of his constitutional rights likewise deprived Perniciaro of those guaranted rights.

We respectfully pray that this Court rehear and reconsider the original petition for a *writ of certiorari* to the Circuit Court of Appeals for the Fifth Circuit and again pray that such writ be granted so that the entire question may be reviewed in the Supreme Court of the United States and particularly so that both defendants may be heard on a question which involves them equally.

Respectfully submitted,

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JOHN D. LAMBERT,
HUGH M. WILKINSON, JR.,
Attorneys for Petitioner.

By_____

I hereby certify that the above petition for a rehearing is filed in good faith and upon a real and substantial ground, and not for mere purposes of delay.

Dated New Orleans, Louisiana, April ____, 1947.

_____

Hugh M. Wilkinson, Sr.
Of Counsel for Petitioner.